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No. 88-899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL LANE, MICHAEL O'LEARY, and RICHARD W. DeROBERTIS, et al.,

Petitioners,

vs.

WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE STATES OF INDIANA AND KANSAS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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28pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals misapprehended the legitimate security concerns of prison administrators already recognized by this Court.

II. Whether the Equal Protection Clause mandates that protective custody inmates be provided with programs and services that are fully equal to those provided for general population inmates.

III. Whether the Court of Appeals misapplied this Court's standard for review of prison policies.

IV. Whether the Court of Appeals misapplied this Court's standard with regard to the defense of qualified immunity.

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INTEREST OF AMICI CURIAE

The Amici Curiae States of Indiana and Kansas submit this brief in support of the Petitioners', officials of the Illinois Department of Corrections, petition for review on writ of certiorari of the decision rendered by the United States

Court of Appeals for the Seventh Circuit in *Williams v. Lane, et al.*, 851 F.2d 867 (7th Cir. 1988) (a copy of the opinion is contained in Petitioners' Appendix). The Court of Appeals affirmed a District Court opinion that protective custody inmates at the Stateville Correctional Center, one of Illinois' four maximum security prisons, were entitled to the same programs and services as those provided to general population inmates. *See, Williams v. Lane, et al.*, 646 F. Supp. 1379 (N.D. Ill. 1986) (a copy of the opinion is contained in Petitioners' Appendix).

In its opinion, the District Court concluded that the Illinois correctional officials' restrictions on certain services and their failure to provide protective custody inmates with programs and services equal to general population constituted, *inter alia*, a violation of the inmates' First Amendment rights to freedom of religion and their Fourteenth Amendment rights to access to the courts and equal protection. Additionally, the District Court, citing cases concerning generalized inmate rights to freedom of religion and access to the courts, stripped the prison officials of qualified immunity despite prior rulings by the Seventh and Fourth Circuits that equal programming for protective custody inmates was not required.

The creation of a right of protective custody inmates to have programs and services equal to those provided to general population inmates, and the denial of qualified immunity for officials who do not provide such equal programs and services, will adversely impact the operation of Amici's prisons. The Amici states currently operate maximum security prisons which to some degree restrict the programs and services to protective custody inmates compared to those provided to general population inmates. In neither of the Amici states are protective custody in-

mates afforded all programs and services provided to general population inmates. In operating their protective custody units, Amici's prison administrators have, wherever possible, attempted to isolate protective custody inmates not only from the general population but also from each other in order to address the unique security needs which these inmates present.

For example, in the Amicus State of Indiana, the inmates housed in the protective custody units of the state's prisons are offered more restricted programs than are offered to the general population inmates. While the programs and services afforded protective custody inmates vary from institution to institution, in no institution are protective custody inmates permitted direct access to the law library; in institutions where educational services are offered to protective custody inmates, they are offered in cell, not communally; and protective custody work assignments are very limited. While some institutions in Indiana permit weekly communal religious services and communal dining, in other institutions such services are not offered to protective custody inmates. If the Court of Appeals' decision in this case is permitted to stand, correctional officials may be required to redesign their protective custody policies and units at substantial cost and risk to security.

The decision of the Court of Appeals holding unconstitutional policies which are highly similar to Amici's prison administrators' policies for addressing the security needs of protective custody inmates raises significant legal questions concerning the operations of protective custody units in Amici's facilities. The Seventh Circuit's ruling cuts directly to the heart of the most fundamental area of penological interest, namely safety and security. If admin-

istrators in the Amici states are required to provide communal activity to protective custody inmates similar to that provided to general population, security will be jeopardized and operating costs will be drastically increased. Protective custody inmates are often a threat to one another; the threat is not only from general population inmates. Moreover, the Seventh Circuit's ruling on qualified immunity could result in administrators being exposed to thousands of individual liability actions, with a potential cost of enormous magnitude.

In light of the serious impact the Court of Appeals' decision has on the fundamental penological interest and the operation of Amici's prison systems, the Petitioners' petition for review on writ of certiorari should be granted by this Court.

STATEMENT OF THE CASE

Amici rely on the statement as set forth in the petition of the Defendants-Petitioners.

ARGUMENT

I.

THE COURT OF APPEALS MISAPPREHENDED THE LEGITIMATE SECURITY CONCERNS OF PRISON ADMINISTRATORS ALREADY RECOGNIZED BY THIS COURT.

In deferring to certain factual findings of the District Court in this case, the Court of Appeals has misapprehended the legitimate security concerns of prison administrators already recognized by this Court. There is no question that even based on the factual findings of the District Court, the protective custody unit at Stateville is not violative of the United States Constitution. Courts have previously noted the unique safety and security concerns which prisoners assigned to protective custody present; the danger which would arise if these inmates are not isolated from general population inmates; and the legitimate operational concerns these inmates present to prison administrators. Refusal by the District Court and Court of Appeals to recognize these concerns could imperil the lives of prisoners and correctional staff in prisons throughout the nation.

This Court has long recognized the intractable problems in managing a modern correctional facility. *Bell v. Wolfish*, 441 U.S. 520, 548, 99 S.Ct. 1861, 1867 (1979). The violent nature of the American prison population is also well recognized. *See, Murphy v. United States*, 653 F.2d 637, 642 (7th Cir. 1981) ("[v]iolence is unfortunately endemic to American prisons"); and *Marchesani v. McCune*, 531 F.2d 459, 462 (10th Cir. 1976), *cert. denied*, 429 U.S. 846, 97 S.Ct. 127 (1976) ("[p]rison setting is at best tense. It is sometimes explosive and always potentially dangerous.").

This Court has also noted the dangerous nature of American prisons, characterizing them as:

> . . . a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life.

Wolff v. McDonnell, 418 U.S. 539, 561-562, 94 S.Ct. 2963, 2977 (1974). Stateville, as one of Illinois' four maximum security prisons, is no exception to this rule. In fact it is undisputed that the inmates at Stateville are among Illinois' most dangerous offenders.

The violent criminals incarcerated at a prison such as Stateville pose not only a danger to the public, but to each other as well. As this Court noted in *Hewitt v. Helms*, 459 U.S. 460, 474, 103 S.Ct. 864, 872 (1983):

> [i]n the violatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disasterous incidents.

See also, Doe v. District of Columbia, 701 F.2d 948, 951 (D.C. Cir. 1983) ("[t]he existence of some violence in prisons is unavoidable, given the character of prisoners society must place behind bars.").

The fact that dangerous inmates congregating together may constitute a significant threat to institutional security has been recognized by this Court:

> It is clearly not irrational to conclude that . . . concerted group activity, or solicitation therefore, would pose additional and unwarranted problems and frictions in the operation of the State's penal institutions. The ban on inmate solicitation and group meetings, therefore, was rationally related to the reasonable, indeed to the central, objectives of prison administration.

Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129, 97 S.Ct. 2532, 2539 (1977).

The District Court's order compelling increases in communal activities, including dining, recreation, education, religious services and library access, requires implementation of practices which have already been recognized by this Court as disregarding basic security concerns. The opinion serves to minimize the importance of security, a position which is clearly at odds with prior decisions of this Court.

> The safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration. *See Bell v. Wolfish, supra,* 441 U.S. at 547, 99 S.Ct. at 1878; *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119, 132, 97 S.Ct. 2532, 2541, 53 L.Ed. 2d 629 (1977); *Pell v. Procunier,* 417 U.S. 817, 823, 94 S.Ct. 2800, 2804, 41 L.Ed. 2d 495 (1974); *Procunier v. Martinez,* 416 U.S. 396, 404, 94 S.Ct. 1800, 1807, 40 L.Ed. 2d 224 (1974).

Hewitt, 459 U.S. at 473, 103 S.Ct. at 872.

In the present case, the danger of providing programs and services, while ignored by the District Court, was readily apparent to the Special Master appointed by the District Court. In the Introduction to the Special Master's Proposed Remedial Plan (excerpts of the Proposed Remedial Plan are attached as Appendix A [App. A]) which was filed with the District Court on December 20, 1988, the

Special Master made the following observation on the impact of his Proposed Remedial Plan:

> As the plan I offer is implemented, it must be appreciated that every increment of time in association and most increments of industrial, educational, and recreational programs increases the risk of injury to one prisoner inflicted by another. Hence, failures of equal protection in one protective custody regime, as at present, risk being supplanted by failures sufficiently to protect the inmates one from another. The balance is neither obvious nor easy to strike.

App. A-4. The Special Master's Proposed Remedial Plan acknowledges the dangers attendant on providing programs and services to protective custody inmates which have been well recognized by this Court and which were ignored by the District Court and the Court of Appeals. Moreover, these conclusions by the Special Master directly contradict the District Court's finding that the Petitioners had no legitimate security interests in restricting programs.

The failure of the District Court to recognize Petitioners' security interest in limiting the congregation of maximum security protective custody prisoners for their own safety, and the Court of Appeals' affirmation of that decision, is contrary to the law established by this Court. As this ruling misapprehends the legitimate security interests of prison administrators which have been repeatedly recognized by this Court, the Seventh Circuit decision should be reversed.

II.

THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THAT INMATES IN PROTECTIVE CUSTODY RECEIVE PROGRAMS AND SERVICES THAT ARE FULLY EQUAL TO THOSE AFFORDED TO GENERAL POPULATION INMATES.

The equal protection clause does not deny a State the power to treat different classes of persons in different ways. *Eisenstadt v. Baird*, 405 U.S. 438, 446-47, 92 S.Ct. 1029, 1035 (1972). If the group to which plaintiffs belong is not similarly situated to the group receiving the benefits to which they claim entitlement, the equal protection clause cannot be implicated. The differences in the circumstances of protective custody and general population inmates and the special needs of protective custody inmates have been uniformly recognized by Courts. *Harris v. Fleming*, 839 F.2d 1232, 1236 (7th Cir. 1988); *French v. Owens*, 777 F.2d 1250, 1256 (7th Cir. 1985); *Allgood v. Morris*, 724 F.2d 1098, 1100-01 (4th Cir. 1984). It is uncontested that inmates confined in protective custody have demonstrated a special desire and need to be protected from other inmates for their own welfare, and that general population and protective custody inmates must be separated to a significant extent. Therefore, providing different programs and services to these inmates does not implicate the equal protection clause.

Moreover, it is well settled that the guarantee of equal protection is not the source of substantive rights or liberties. *Harris v. McRae*, 448 U.S. 297, 322, 100 S.Ct. 2671, 2691 (1980); *see also, Shango v. Jurich*, 681 F.2d 1091 (7th Cir. 1982). The Constitution does not guarantee protective custody inmates equal privileges to those afforded to general population inmates. Indeed, Judge Flaum in his concurring opinion in this case notes that the deci-

sion may well impose upon Petitioners "the burden of affording to protective custody inmates *rights which are not necessarily indicated by recent Supreme Court precedent.*" [Emphasis added]. *Williams*, 851 F.2d at 886. Creation of such new rights is impermissible.

However, even assuming that the equal protection clause were implicated, it is undeniable that there exists a rational relationship between restricting the access of protective custody inmates to communal programs and services and the legitimate security concerns relating to those inmates. The District Court found that protective custody inmates fight among themselves and may face a general undefined threat from other protective custody inmates. *Williams*, 646 F.Supp. at 1395. Providing access to comparable programs and services communally, as the District Court requires, necessarily will expose protective custody inmates to other inmates in protective custody or in general population and increase the risk of assault upon those inmates. Not only does the decision of the Court of Appeals in the instant case not credit this principle, it conflicts with other decisions within the Seventh Circuit as well as the Fourth Circuit. *See, French, supra*; *Lock v. Jenkins*, 641 F.2d 488 (7th Cir. 1981); *Taylor v. Rogers*, 781 F.2d 1047 (4th Cir. 1986); and *Allgood, supra.*

In *French*, the Seventh Circuit, quoting the Fourth Circuit's decision in *Allgood*, reversed a District Court ruling that security concerns of the prison officials were insufficient to limit access of protective custody inmates to the same programs and services as general population inmates. The Seventh Circuit noted:

> Protective segregation is offered to inmates for their safety, the safety of others in confinement, and to insure institutional security and order. To allow prisoners in protective custody to enjoy all of the same

> privileges to the same degree as those in the general population would eviscerate the nature of protective segregation. Because the difference in treatment among prisoners and the general population has a substantial, rational basis in the legitimate state interest of prison security, we hold that . . . rights to equal protection have not been abridged.

777 F.2d at 1256 (quoting *Allgood v. Morris*, 724 F.2d 1098, 1100-1101 (4th Cir. 1984)).

The Seventh Circuit's decision in this case is inconsistent with *French*. In reliance on the *French* decision, the Amicus State of Indiana has continued to provide limited programs and services to inmates in protective custody at the Indiana Reformatory, the institution which was the subject of the suit in *French*, as well as at its other prisons. It is the position of the Amici States that in accordance with *French*, restrictions on the programs for inmates in protective custody do not violate the equal protection clause.

In *Taylor*, the Fourth Circuit upheld more restrictive conditions imposed on protective custody inmates than those present at Stateville. The conditions which the Fourth Circuit found not to be violative of equal protection included the following:

> . . . there is no law library. There is no telephone in the cell block in which prisoners in protective custody are lodged. The exercise yard for the segregation facility is not as commodious as that for the general population. Overall, the limited availability of staff and the need to protect prisoners in protective custody limits or prohibits organized recreational activities, organized drug counseling, vocational training and other rehabilitative classes, the availability of organized religious services, visitation rights and the availability of gain time or incentive wage jobs.

781 F.2d at 1049.

The Fourth Circuit concluded in *Taylor*:

> . . . that conditions imposed on prisoners requesting protective custody less favorable than those afforded the general prison population do not give rise to a meritorious claim of denial of equal protection or a denial of due process where restrictions bear a rational relationship to the protection of the prisoner requesting such relief and where the restrictions are not so onerous as to jeopardize his health.

781 F.2d at 1050.

The conclusion of the Court of Appeals based on the facts in *Taylor* cannot be reconciled with the conclusions of the Court of Appeals based on the facts in this case, especially in light of this Court's recognition in *Jones* of the obvious danger created when inmates congregate. *See*, Section I of this Argument. The application of the equal protection clause to the disparity in programs and services between protective custody and general population inmates without recognition of the obvious security problems attendant on providing protective custody inmates a safe environment is a clear misapplication of the equal protection clause.

III.

THE COURT OF APPEALS MISAPPLIED THIS COURT'S STANDARD OF REVIEW ENUNCIATED IN *TURNER* AND *O'LONE*.

In its decision, the Court of Appeals' panel recognized that the standard to determine the constitutionality of the restrictions at issue is the test articulated by this Court in *Turner v. Safley*, ____ U.S. ____, 107 S.Ct. 2254 (1987), and *O'Lone v. Estate of Shabazz*, ____ U.S. ____, 107 S.Ct. 2400 (1987). However, the panel's decision did not properly apply the *Turner-O'Lone* standard when it held that

the restrictions imposed on programming for protective custody inmates at Stateville were unconstitutional.

In the *Turner* and *O'Lone* cases, this Court identified four factors that must be weighed in judging the constitutionality of a prison regulation. This test and the decisions reached by this Court in *Turner* and *O'Lone* cannot be reconciled with the conclusion of the Court of Appeals in the instant case which found no logical connection between restricting the programming of protective custody inmates and the unique security needs of those inmates. Regardless of any credibility findings made by the District Court, the Court of Appeals' conclusion is clearly erroneous in light of this Court's analysis concerning the inherent dangers in congregating convicted felons in a maximum security prison and the primacy of security and safety as a penological objective. There is obviously a logical relationship between the restriction of protective custody inmate movements and the maintenance of their safety and security. *Accord*, *Lock v. Jenkins*, 641 F.2d 488, 497 (7th Cir. 1981) ("[p]risoners selecting placement in the [protective custody] Unit, generally to avoid perceived dangers to themselves, also logically must be subject to significant restrictions."). This logical relationship between inmate safety and restrictions on programming is even recognized by the District Court's own Special Master. App. A-4.

The Court of Appeals' decision also fails to apply the other *Turner-O'Lone* factors in a manner consistent with this Court's direction. In its opinion, the panel dismissed the fact that protective custody inmates at Stateville had been afforded alternative means to exercise their restricted rights, particularly in the areas of religion and law library services. Similarly disregarded was the staggering financial burden that the District Court's order would impose on the State of Illinois.

By misapplying of the *Turner-O'Lone* standards, ignoring the logical connection between restriction on the activities of protective custody inmates and their physical safety and security, failing to recognize the provision of alternative access to programs and services and disregarding the obvious financial consequences of the District Court's order, the Court of Appeals has set an extraordinarily dangerous precedent. If Amici are faced with similar litigation based on the ruling in this case, the consequences could well be the degradation of security practices nationwide and the imposition of mammoth expenses on already overburdened prision systems.

IV.

THE COURT OF APPEALS MISAPPLIED THIS COURT'S STANDARD FOR APPLICATION OF QUALIFIED IMMUNITY.

The social costs in the form of financial and operational burdens that liability suits brought under 42 U.S.C. Section 1983 impose on state officials are well recognized by this Court. *See, Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034 (1987). As a way of balancing the burden on government officials against the interests of citizens to preserve their civil rights, this Court ruled in *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982), that government officials generally are shielded from liability for civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. In *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806 (1985), this Court stated that when reviewing a denial of a claim of qualified immunity a court must decide only a question of law; namely, "whether the legal norms allegedly violated by the defendant were *clearly established* at the time of the chal-

lenged actions." (emphasis supplied) 472 U.S. at 528, 105 S.Ct. at 2816. The standard for making that determination is an objective one. *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738.

This case illustrates the need for qualified immunity. The class consists of all inmates who have been assigned to protective custody at any time since April 30, 1982, or who will be assigned there in the future. *Williams*, 646 F. Supp. at 1381. The District Court found that the protective custody population at Stateville averaged about two hundred, while noting that at the time of trial there were between two hundred and sixty and three hundred inmates. Assuming that the class, for purposes of damages, included all inmates housed in the unit from April 30, 1982 to the present, plaintiffs would be entitled to damages for over a six and one-half year period. Calculated at the District Court's modest average of two hundred inmates for a six and one-half year period, at one dollar a day, a judgment would subject the Petitioners to damages in the amount of $474,500. At ten dollars a day damages total $4,745,000. In addition, prison officials would be required to expend substantial sums defending against hundreds of individual damage claims. Pursuant to the stipulation noted in the District Court's opinion, this number exceeded five hundred inmates at the time of trial in February 1986. In light of the number of persons incarcerated and thus affected by policies and practices in prisons throughout the country, qualified immunity protects prison officials from enormous judgments. The defense of qualified immunity should only be denied where the law is clearly established. It was not when this suit arose.

Prior to the Court of Appeals' decision in this case, panels of both the Fourth and Seventh Circuits addressed the specific issue of the right of protective custody in-

mates to programs and services equal to those provided to inmates in general population. The panels concluded that the actions of prison administrators in denying such equal access were constitutional. *See*, *French*, *supra*; *Lock*, *supra*; *Allgood*, *supra* and *Taylor*, *supra*. In *French*, a case in which rehearing was denied by the Seventh Circuit after the conclusion of the trial in this case, the Seventh Circuit stated, "This circuit has previously held that security reasons justify limiting the access of prisoners in protective custody." 777 F.2d at 1256. It is clear that the rights at issue in this case were not clearly established at the time of trial.

The District Court in *Williams* found Defendants' practice of bringing protective custody inmates to study carrels, rather than permitting them to browse in the law library, violated their right to access to the courts. Even assuming this to be correct, it cannot be said to constitute a clearly established right as the Seventh Circuit in *French* reversed the District Court's finding and held that the failure to permit inmates on self lock up to go to the library was not a constitutional violation. *See*, *French v. Owens*, 538 F.Supp. 910, 920 (S.D. Ind. 1982).

The Court of Appeals in this case, however, ignored those decisions and instead relied on cases such as *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1941 (1977), and *Cruz v. Beto*, 405 U.S. 319, 92 S.Ct. 1079 (1972) in determining that the petitioners were in violation of clearly established law. *Bounds* and *Cruz*, however, are seminal decisions which articulated the general rights to access to courts and freedom of religion for prison inmates. These decisions do not specify how these rights are to be provided to protective custody inmates, and in no way established a clear legal norm as required under *Harlow* concerning the issues presented in this case. Under the reasoning of the

District and Circuit Courts, any determination that an inmate's right of access to the courts or freedom of religion has been violated could result in rejection of the qualified immunity defense, since the generalized rights have been established in *Bounds* and *Cruz*. This restrictive application of the defense of qualified immunity is contrary to this Court's prior decisions and defeats the underlying public policy.

If the Court of Appeals' misapplication of qualified immunity is permitted to stand, the requirement of showing clearly established law will become a nullity. Prison administrators will act at their peril, for the mere existence of a generally recognized constitutional right will strip them of their qualified immunity, regardless of the specific situations and circumstances which present themselves to the administrators during the day to day operations of their prisons. The result of the Seventh Circuit's interpretation of qualified immunity may be to expose the correctional administrators of Amici to thousands of lawsuits based only on generalized theories of constitutional liability.

CONCLUSION

For the foregoing reasons, the Amici Curiae States of Indiana and Kansas request that this Court grant Petitioners' petition for review on writ of certiorari.

Respectfully submitted,

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December 27, 1988

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIE WILLIAMS, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

MICHAEL LANE, et al.,

Defendants.

No. 81 C 0355—Judge Milton I. Shadur, Presiding

PROPOSED REMEDIAL PLAN

December 20, 1988
submitted by
Norval Morris, Special Master

INTRODUCTION

This proposed remedial plan provides for a dramatically different protection custody regime than that now enforced at Stateville. Lest it be thought the product of an academic's specious imaginings, let me stress that in its broad contours, its shape and most of its details, it closely tracks recommendations made by representatives of the Department of Corrections at a week-end meeting (a "retreat") convened for this purpose in mid-November. At that meeting, Mr. Mahoney and I, assisted by Mr. Norman Carlson, and Mr. John Rees, were the recipients of the Department's suggestions, and found ourselves not only in agreement with their broad thrust and most of their details,

but also impressed by the care and generosity of spirit with which they had been prepared. There were, of course, sticking points and points of conflict, but they concerned matters of detail and scope, not issues of the general direction to be followed.

I have not isolated what were and what were not Departmental recommendations. The meeting at which the pattern of this proposal was settled was intended to be one of free exchange, advisory rather than in any way binding; but it is nevertheless proper for me to stress that the theme of this remedial plan is essentially a product of the work of members of the Department of Corrections—to whom I am grateful.

Many of the problems of this protracted litigation have their origin, [sic] (in my view, and in that of the consultants who have assisted me, and members of the staff of the Department of Corrections in their unguarded moments, in what I have come to think of as the hydraulic effect of protective custody.

It is a problem common to many large prisons in this country. If the large maximum-security prisons prove to be largely ungovernable, heavily influenced by gang behavior, places of pervading fear for the weak and the isolate, protective custody gains in attraction to many prisoners. This is particularly true when protective custody provides both relative safety and single celling. Further, it is extremely difficult to test the reality of fears for their safety expressed by prisoners as a reason for seeking protective custody (many prisoners gave to me, as their reasons for being in protective custody, reasons which were inconsistent with the defined purposes of that classification and different from what they had earlier claimed in order to gain admission to protective custody).

There thus emerges a serious problem of "gate keeping" if the prison authorities are not to be faced with the task of running two prisons in every large maximum-security prison. And there thus further emerges a strong temptation to make the conditions in protective custody substan-

tially less congenial, setting aside personal harassment and safety, than those allowed by general population of the prison. This temptation is abetted by the understandable desire, enforced by threat of civil suit, to make conditions in protective custody extremely safe—which is another way of saying lacking in the usual prison programs, since each increment of program adds an increment of risk of injury.

Recognizing these genuine difficulties, I had at first been encouraged by the authorities at Stateville, by counsel to the Department of Corrections and counsel to the plaintiffs, to include in the commentary to this proposed remedial plan some ideas that might help to mitigate this problem. At the "retreat" I was advised that, for reasons relating to other cases confronting the Department, they did not wish me to deal at any length with this problem—merely to note its obvious existence, as I now have. Since the terms of reference of my appointment do not include this issue, I shall take the matter no further unless requested to do so by the Court.

A further important issue was also withdrawn from discussion by the Department at the "retreat." I will merely mention what it was and avoid exegesis. Norman Carlson, John Rees, Michael Mahoney and I are all of the view that double celling in protective custody, at least to the same proportional extent that it exists in the general population, though undesirable, is not inappropriate given population pressures, and that it can be done without serious threat to security. The Department's position is that double celling does not fall within my terms of reference and they requested that I should not expand on the topic, though prior to the "retreat" I was being encouraged to deal with it.

As a final introductory comment let me add this: A prison in complete lock-down, while it is in lock-down, is a safe prison. Protective custody now at Stateville—which is not in lock-down but is very tightly controlled, with limited inmate interaction, and with rarely any substantial number of prisoners out of their cells at any one

time—is a relatively safe form of imprisonment, as indicated by the low indeces of assaults there as compared to the general population. As the plan I offer is implemented, it must be appreciated that every increment of time in association and most increments of industrial, educational, and recreational programs increases the risk of injury to one prisoner inflicted by another. Hence, failures of equal protection in one protective custody regime, as at present, risk being supplanted by failures sufficiently to protect the inmates one from another. The balance is neither obvious nor easy to strike. It is my view that the balance struck in the following proposed remedial plan avoids any failure of equal protection and yet provides for the establishment of constitutionally safe protective custody regimes at Stateville.

The proposal is arranged under the following headings:

Full and Limited Programs
Religion
Library (Law and General)
Education
Jobs and Pay
Food
Recreation
Cell Time and Association
Monitoring

Under each heading there is a proposal and a commentary. Where appropriate a cost estimate is included at the end of each commentary. The proposals are collected into a Proposed Remedial Order appended to this document.

Mr. Mahoney has authorised me to state that he is in express and detailed agreement with me in the proposed remedial plan and that he also agrees with the general tenor of the commentary.

Many have helped Mr. Mahoney and me in this task, but we both wish to express our particular gratitude to Mr. Leo Meyer, Warden O'Leary, Mr. Norman Carlson, Mr. John Rees, and Ms. Judy Cottle.

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